Supreme Court, U.S.
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No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1] A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber regularly files amicus briefs in this Court, including in cases involving important issues of class action practice and procedure. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (filed Aug. 14, 2015); *Campbell-Ewald Co. v. Gomez*, No. 14-857 (filed July 23, 2015); *Spokeo, Inc. v. Robins*, No. 13-1339 (filed July 9, 2015).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amicus*, its counsel, or its members made such a monetary contribution. Counsel for all parties received notice at least 10 days before the due date of *amicus*'s intention to file this brief. Respondents' letter consenting to the filing of this brief has been filed with the Clerk. Petitioner has given blanket consent to the filing of *amicus* briefs in support of either party.

Businesses are regularly named as defendants in class actions. The Chamber and its members therefore have a strong interest in ensuring that the courts correctly apply the federal law governing class actions. By failing to do that here, the Ninth Circuit has allowed class-action plaintiffs to take immediate appeals of orders denying class certification even in cases where the requirements for interlocutory appeal under Federal Rule of Civil Procedure 23(f) have not been met. The Chamber and its members have an interest in seeing this practice end.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs in putative class actions have long urged federal courts to allow immediate appeals of orders denying class certification. Plaintiffs contend that an immediate appeal is necessary because "only a lunatic or a fanatic" will litigate a claim seeking a few hundred dollars (or less) if that claim cannot be tried on a classwide basis. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). Accepting this argument, several courts of appeals developed the "death knell" doctrine, which treated an order denying class certification as a final judgment—and thus immediately appealable as of right under 28 U.S.C. § 1291—whenever the order made it "economically imprudent" for the plaintiff to litigate his or her individual claims. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 466 (1978).

This Court put an end to that practice in *Livesay*. Reaffirming the principle that appellate review of interlocutory orders typically must wait until after

final judgment, the Court unanimously held that an order denying class certification is not immediately appealable under § 1291 even if the order sounds the death knell for the plaintiffs' claims. *Id.*[2] The Court noted that adopting the death knell doctrine would lead to piecemeal appeals and thus waste judicial resources. *Id.* The Court also criticized the doctrine for "operat[ing] only in favor of plaintiffs," even though obtaining immediate appellate review of class certification orders "will often be of critical importance to defendants as well." *Id.* at 476.

This case involves an attempt to do what *Livesay* held cannot be done: obtain an immediate appeal as of right under § 1291 of an order denying class certification. Rather than invoking the discredited death knell doctrine, plaintiffs here voluntarily dismissed their claims following the district court's decision striking their class action allegations, and then immediately appealed the district court's order under § 1291. App. 10a.

Had the plaintiffs done this in the Third, Fourth, Seventh, Tenth, or Eleventh Circuits, their appeal would have been dismissed without any appellate review of the class certification order. *See* Pet. at 9-11 (collecting cases). But in the Second and Ninth Circuits, this tactic may be used to generate an immediate appeal of an order denying class

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[2] The Court noted one express exception to this rule: Parties can seek an interlocutory appeal of a class certification order under § 1292(b). *See Livesay*, 437 U.S. at 475. Importantly, a § 1292(b) appeal cannot be taken as of right, but is left to the discretion of both the district court and the court of appeals. *Id.*

certification. In this case, the Ninth Circuit not only exercised jurisdiction under § 1291 based on the voluntary dismissal, but it also reversed the order striking the class action allegations and remanded the case for further proceedings. App. 19a.

I. The Federal Rules of Civil Procedure allow for immediate appeal of a class certification order only in limited circumstances and only at the discretion of the court of appeals. Importantly, the rules apply equally to plaintiffs and defendants because all parties have an interest in seeking immediate review of class certification orders. The Ninth Circuit's voluntary dismissal rule—like the death knell doctrine before it—upsets the balance struck by the federal rules. In *Livesay*, this Court rejected the death knell doctrine because it wasted judicial resources and did not apply equally to all parties. The voluntary dismissal rule has the same flaws and should be similarly rejected.

II. The question presented is exceptionally important. Defendants have always faced substantial pressure to settle cases in which a class is certified, and that pressure has only increased as more plaintiffs seek certification of nationwide classes. That the Ninth Circuit permits plaintiffs to seek immediate review of class certification denials makes the issue even more important because a disproportionate number of class actions are filed in California. This case is an ideal vehicle for resolving the circuit split because the question is squarely presented, the parties have fully litigated the issue, and it is outcome determinative.

The Court should grant the petition to resolve the circuit split and reaffirm *Livesay*'s holding that a plaintiff may appeal an order denying class certification as of right under § 1291 only after final judgment is entered following litigation of the claims on the merits.

ARGUMENT

I. The Ninth Circuit Has Distorted Class Action Practice by Providing Immediate Appellate Review of Class Certification Orders for Plaintiffs, But Not Defendants.

Federal law expressly provides a method for parties to seek immediate appellate review of a class certification order. *See* Fed. R. Civ. P. 23(f). Under Rule 23(f), a party can petition for interlocutory review of the order, and the court of appeals has discretion to take the appeal and review the class certification order prior to final judgment. *Id.* Importantly, Rule 23(f) applies to orders both granting and denying class certification, and thus the rule makes appellate review available on the same terms to both plaintiffs and defendants.

The Second and Ninth Circuits allow an additional method for obtaining immediate appellate review. These courts permit a plaintiff to forgo litigating his or her claims on the merits and to take an immediate appeal of an order denying class certification by voluntarily dismissing the claims with prejudice and then appealing under § 1291. Unlike an appeal under Rule 23(f), the court of appeals has no discretion to decline jurisdiction over the appeal. And because this tactic depends on dismissing the

claims—something a defendant cannot do—this method for obtaining immediate appellate review is available only to plaintiffs. By permitting this practice, the Second and Ninth Circuits have effectively revived the death knell doctrine and have given plaintiffs an unfair advantage in obtaining appellate review of class certification orders.

A. The Federal Rules Give Plaintiffs and Defendants the Same Right to Seek Immediate Appellate Review of Class Certification Orders.

The Federal Rules of Civil Procedure were amended in 1998 to provide for immediate appellate review of class certification orders in limited circumstances. *See* Fed. R. Civ. P. 23(f).[3] This new rule, Rule 23(f), was not intended to revive the death knell doctrine. Instead, the rule was designed to allow for appellate review only in limited cases and to do so in a way that avoided many of the problems created by the death knell doctrine.

The "principle vice" of the death knell doctrine was that it "authorize[d] indiscriminate interlocutory review of decisions made by the trial judge." *Livesay*, 437 U.S. at 474. This Court has long recognized that piecemeal appeals can have a "debilitating effect on judicial administration." *Id.* at 471 (internal quota-

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[3] Rule 23(f) provides, in relevant part: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered." Fed. R. Civ. P. 23(f).

tion marks and citation omitted). Yet the death knell doctrine made piecemeal appeals more likely, because it allowed a plaintiff to appeal an order denying class certification before litigating her individual claims on the merits. *See id.* at 474.

Rule 23(f) minimizes the possibility of piecemeal appeals by making interlocutory appeals the exception, not the rule. Rather than creating a right to appeal all class certification orders, Rule 23(f) simply permits a party to petition for appellate review, and the court of appeals exercises discretion to decide whether to hear the case. Fed. R. Civ. P. 23(f). Courts have stated that "Rule 23(f) review should be a rare occurrence," because interlocutory appeals "are disruptive, time-consuming, and expensive." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955, 959 (9th Cir. 2005). A recent study found that courts of appeals have granted less than a quarter of Rule 23(f) petitions.[4]

The death knell doctrine was also problematic because, in addition to allowing appeals as of right from all denials of class certification, it "operate[d] only in favor of plaintiffs." *Livesay*, 437 U.S. at 476. As the Court explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Id.* As a result, obtaining

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[4] *See* John Beisner et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014), http://bit.ly/1GNGoI5.

immediate appellate review of class certification orders "will often be of critical importance to defendants." *Id.*[5]

Rule 23(f) rectifies this imbalance by allowing both plaintiffs and defendants to petition for appellate review of class certification orders. Fed. R. Civ. P. 23(f). The Committee Note explains that the rule applies to all parties because all parties have an interest in seeking immediate appellate review:

> An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits on an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.

Fed. R. Civ. P. 23 Committee Note (1998).

Courts of appeals have treated plaintiffs and defendants similarly in applying Rule 23(f). As the Seventh Circuit has explained, "just as a denial of

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[5] The Court recently reiterated that class actions present a significant "risk of 'in terrorem' settlements," because defendants "[f]aced with even a small chance of a devastating loss . . . will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). A recent study found that Rule 23(f) petitions filed by plaintiffs and defendants are granted at roughly the same rate.[6]

In sum, Rule 23(f) allows for immediate appeal of class certification orders, but it does so without running into the problems created by the death knell doctrine. Rule 23(f) minimizes the risk of piecemeal appeals by making appellate review discretionary. And, unlike the death knell doctrine, Rule 23(f) provides a level playing field for both plaintiffs and defendants by allowing all parties to seek interlocutory review of class certification orders.

B. The Ninth Circuit Has Effectively Revived the Death Knell Doctrine, Giving Plaintiffs an Unfair Advantage in Seeking Appellate Review.

The Ninth Circuit's ruling in this case upsets the balance struck by Rule 23(f) and creates the same problems as the death knell doctrine. Plaintiffs in this case petitioned for interlocutory review under Rule 23(f), but the Ninth Circuit denied the petition. App. 10a. Yet, rather than litigating their claims on

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[6] Courts of appeals have granted 20.5% of the petitions filed by plaintiffs, and 24.8% of the petitions filed by defendants. *See* John Beisner et al., *supra* n.4.

the merits before taking an appeal from a final judgment, plaintiffs instead voluntarily dismissed their claims with prejudice and immediately appealed the district court's order striking their class action allegations. *Id.* The Ninth Circuit held that this tactic was sufficient to create appellate jurisdiction to review the district court's order, notwithstanding its prior determination that the order did not warrant immediate review. App. 19a.

The Ninth Circuit's voluntary dismissal rule differs from the death knell doctrine in only one respect. Under the death knell doctrine, plaintiffs did not merely have to dismiss their claims; they had to prove that it would be infeasible for them to pursue their claims on an individual basis. *Livesay*, 437 U.S. at 466. But this distinction makes little difference in practice. Under the voluntary dismissal rule, a reversal of the class certification order appears to undo the plaintiffs' dismissal of his or her claims. App. 19a (reversing and remanding for further proceedings).[7] As a result, under either the death knell doctrine or the voluntary dismissal rule, plaintiffs who do not wish to pursue their individual claims

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[7] The Ninth Circuit has not explained why a plaintiff should not be held to a decision to dismiss his or her claims with prejudice, but the order here suggests that this decision is revocable. Of course, if there is no basis for a plaintiff to revive his or her claims on remand, he or she would not have standing to appeal the class certification order. *See, e.g.*, *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980); *cf. Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013). On the other hand, if the plaintiff can revoke his or her dismissal, it is difficult to see how the resulting judgment is sufficiently final to support an appeal.

can take an immediate appeal and, if they prevail, can resume litigating the claims on remand. Indeed, the voluntary dismissal rule is even more capacious than the death knell doctrine, as plaintiffs can dismiss their claims and take an appeal at whim, even without a finding from the district court that it would be impractical to continue litigating their claims on an individual basis.

The voluntary dismissal rule thus doubles down on the same flaws as the death knell doctrine—flaws that Rule 23(f) was designed to avoid. As in *Livesay*, "[t]he potential waste of judicial resources is plain." 437 F.3d at 473. This case provides a good example. The Ninth Circuit held that the district court erred in striking the class allegations because it relied on a ruling that had since been undermined by an intervening Ninth Circuit decision. App. 18a-19a. The court of appeals expressly stated that it "express[ed] no opinion," however, on whether a class should be certified. App. 19a. As a result, the district court must consider on remand any grounds for opposing class certification that Microsoft may offer in response to a motion to certify the putative class. If the district court denies class certification on any of those grounds, the plaintiffs can voluntarily dismiss their claims again and take another appeal.

To make matters worse, the threat of piecemeal appeals resulting from the voluntary dismissal rule is not limited to orders denying class certification. In rejecting the death knell doctrine, this Court acknowledged that there was no principled basis for limiting the doctrine to class certification orders. *See Livesay*, 437 U.S. at 470. The Court explained: "[I]f

the 'death knell' doctrine has merit, it would apply equally to the many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment—that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." *Id.* The Third Circuit recently made the same point in rejecting the voluntary dismissal rule. *See Camesi v. Univ. of Pitt. Med. Ctr.*, 729 F.3d 239, 245-45 (3d Cir. 2013) (If the court "were to permit such a procedural sleight-of-hand, there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions that a district court makes before it reaches the merits of an action.").

The Ninth Circuit's voluntary dismissal rule, like the death knell doctrine, also unfairly disadvantages defendants. The rule necessarily applies only to plaintiffs because only plaintiffs have claims to dismiss. Although an order certifying a class can have dramatic effects on a defendant—which is why Rule 23(f) permits all parties to petition for interlocutory review, *see supra* at 6-9—defendants have no comparable method for manufacturing an allegedly final order or for otherwise generating an immediate appeal as a matter of right.

This Court rejected the death knell doctrine because it wasted judicial resources and did not apply equally to all parties. The voluntary dismissal rule should be rejected for the same reasons.

II. This Case Presents an Ideal Vehicle to Resolve an Issue of Critical Importance to the Business Community.

This case presents a question of great importance to the Chamber, because the nation's businesses are regularly named as defendants in class-action suits. These businesses have a strong interest in seeing that federal class-action law is interpreted and applied to provide a level playing field between plaintiffs and defendants.

A. The importance of providing defendants with the same appeal rights as plaintiffs has only increased in the nearly four decades since *Livesay*. Plaintiffs have increasingly sought to pursue claims on behalf of nationwide classes, which "can propel the stakes of a case into the stratosphere." *Blair*, 181 F.3d at 834. Cases involving consumer goods, such as the Xbox consoles at issue here, clearly illustrate the threat. Although the potential value of any purchaser's claim presumably is a fraction of the purchase price of a console, the class in this case, according to Microsoft, "may exceed 10 million people." Pet. 16. As this example makes clear, a plaintiff with a claim worth a few hundred dollars can potentially represent a class seeking billions of dollars in damages.

The issue presented is especially important given that the voluntary dismissal rule is applied by the Ninth Circuit. California is a popular forum for class-action plaintiffs because its consumer protection statutes are considered to be plaintiff friendly and because it offers the largest pool of potential

plaintiffs and putative class members. Indeed, one recent study showed that more than 20% of class actions filed in federal courts were filed in California.[8] Given the disproportionate number of class actions filed in California, the rules applied by the Ninth Circuit have particular significance.

B. Despite the importance of the question presented, many cases in which the issue arises will not provide a good vehicle for addressing it. This case, however, presents an ideal vehicle to resolve the circuit split.

Defendants in appeals involving voluntary dismissals in the Second and Ninth Circuits often have no basis to seek this Court's review. Defendants typically prevail on the merits of the appeal, because the district court's denial of class certification is reviewed under the deferential abuse-of-discretion standard. *See, e.g., Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1066 (9th Cir. 2014). When a defendant prevails on appeal, it cannot seek this Court's review of the voluntary dismissal rule because judgment has been entered in its favor.[9]

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[8] Robert J. Herrington, *The Numbers Game:* Dukes *and* Concepcion (Nov. 20, 2012), http://bit.ly/1L0S9pI.

[9] The importance of the question presented is not diminished by the fact that defendants typically prevail on appeal. By permitting piecemeal appeals of class certification rulings as of right, the voluntary dismissal rule wastes judicial resources and imposes significant costs on the parties. *See Livesay*, 437 U.S. at 473-74. That is true regardless of the outcome of the appeals.

In theory, the Court could review the question presented in a petition filed by a plaintiff in a case from a circuit that has rejected the voluntary dismissal rule. But class-action plaintiffs have little incentive to litigate this procedural issue in those circuits. Plaintiffs may not want to invite a decision from this Court that could resolve the circuit split in defendants' favor when the voluntary dismissal rule is still available in actions filed in the Second and Ninth Circuits. And, even if a plaintiff wished to seek this Court's review, he or she would first have to incur the time and expense of taking an appeal that is foreclosed by circuit precedent, and then incur the additional time and expense of seeking this Court's review, which of course is rarely granted.

Moreover, even if the Court granted certiorari and ruled for the plaintiff, he or she would not receive any direct financial benefit from the victory. Instead, if the Court adopted the voluntary dismissal rule, the only benefit to the plaintiff would be the chance to argue in the court of appeals that the denial of class certification was an abuse of discretion—an argument that is unlikely to prevail. *See supra* at 14. Given these obstacles, a plaintiff seeking to challenge the denial of class certification in a circuit that does not follow the voluntary dismissal rule will almost certainly conclude that it is easier to litigate his or her own claim on the merits than to try to overturn the binding circuit precedent.

In contrast to these hypothetical cases in which the question presented is unlikely to reach the Court, this case squarely presents the question and there are no obstacles to the Court's resolving it. The par-

ties have fully litigated the jurisdictional issue, and the issue is outcome determinative. The Court therefore should grant the petition and resolve the circuit split.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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